

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

LACY M. FERDINAND

Claimant

V.

BIMBO BAKERIES USA, INC.

Respondent

AND

INDEMNITY INSURANCE

Insurance Carrier

Docket No. 1,074,348

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the June 2, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven M. Roth. Jan L. Fisher of Topeka, Kansas, appeared for claimant. Douglas C. Hobbs of Wichita, Kansas, appeared for respondent.

On July 31, 2015 ALJ Avery signed an Agreed Order, ordering respondent to provide medical treatment with Dr. Eden Wheeler and pay temporary total disability (TTD) payments beginning June 10, 2015, continuing until claimant is released to regular employment, accommodated employment or is certified as having reached maximum medical improvement. On April 22, 2016, respondent filed an Application for Preliminary Hearing requesting benefits be terminated.

ALJ Roth found respondent's request to end TTD benefits premature:

Claimant has testified about the physical demands her job with Respondent and those demands were strenuous to the degree that the medical concerns of a possible stress fracture is warranted. Until the mystery of the L3 problem is answered with greater certainly [*sic*], the prior findings of compensability and TTD remain unchanged.¹

¹ ALJ Order (June 2, 2016) at 4.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the September 17, 2015, Motion/Penalties Hearing and the exhibits; the transcript of the December 14, 2015, Preliminary Hearing and the exhibits; the transcript of the January 28, 2016, Preliminary Hearing and the exhibits; and the transcript of the May 26, 2016, Motion Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent argues claimant failed to sustain her burden of proving compensability and prevailing factor regarding her accidental injury of June 9, 2015. Respondent maintains the ALJ's Order should be reversed.

Claimant contends the ALJ's Order should be affirmed. Claimant argues the work she performed at respondent was the prevailing factor in causing her current condition.

The issue for the Board's review is: did claimant's injury arise out of and in the course of her employment with respondent?

FINDINGS OF FACT

Claimant worked for respondent as a process technician, where she transferred bags of ingredients, each weighing 50 pounds, from a pallet to a hopper. Claimant explained she had to bend and lift to perform her job duties. She estimated she moved approximately 20-plus bags of ingredients per hour.

On June 9, 2015, claimant was in the process of loading 50-pound bags of ingredients when she experienced a sudden, sharp pain in her left back. Claimant stated this occurred near the end of her shift, so she completed her work day without reporting the incident. Claimant explained she believed she could work through the pain. Claimant testified she treated with ibuprofen and heat/ice after she went home, but the pain gradually worsened and began radiating down both legs. Claimant stated her back pain was severe by the time she reported for work at 6:00 a.m. the following morning. Claimant reported the pain to her supervisor that morning and was told to go to work. Claimant testified she was unable to work due to her pain, and she was referred to chiropractor Dr. Charles Shively by respondent's plant manager.

Dr. Shively directed claimant to perform some stretches and exercises. Claimant testified her pain worsened to the point Dr. Shively recommended she go to the emergency room. Claimant stated she notified respondent she was going to the hospital.

Claimant went to the Stormont-Vail HealthCare emergency department on June 10, 2015. Claimant was admitted overnight for pain control and medication. An MRI was completed and read to reveal:

The lowermost disc space is counted as L5-S1. There is normal lumbar lordosis. Vertebral bodies are normally aligned. There is marrow edema within the left L3 facet and likely pedicle, though this area is not included on the axial sequence. The intervertebral discs demonstrate normal signal. The conus terminates behind L1 and is normal in appearance.

At L3-4, there is mild annular bulge with a small central disc protrusion, effacing the ventral thecal sac without significant central canal or neuroforaminal narrowing.

At L4-5, mild annular bulge noted without central canal or neuroforaminal narrowing.

L5-S1 there is mild annular bulge without central canal or neuroforaminal narrowing.²

On June 15, 2015, claimant was examined at Tallgrass Partners in Health by Charlotte Perry, APRN, who recommended sedentary duty. It was also recommended claimant undergo physical therapy and follow up with her primary care physician. Claimant testified physical therapy was not authorized by respondent. Respondent informed claimant her restrictions could not be accommodated and suggested she not return to work.

Claimant sustained previous injuries to her back. On August 8, 2013, claimant experienced pain while placing her small child in a car seat. Claimant explained she twisted while moving her child and felt a sharp pain in her low back. Claimant visited a chiropractor on two occasions and underwent physical therapy for this incident. She was also seen by a physician assistant on August 16, 2013, when x-rays were taken that revealed no abnormality in claimant's lumbar spine.³ On February 16, 2014, claimant went to the Stormont-Vail emergency room because of right lower back spasms caused by stepping from the shower. X-rays taken that day showed no evidence of fracture or subluxation in the lumbar spine. Claimant treated with the chiropractor two times and had no further problems until the incident of June 2015.

Dr. Edward Prostin examined claimant, at her counsel's request, on July 28, 2015. Claimant complained of a constant ache in the center of her low back with occasional numbness in her left thigh. She complained of stiffness in the morning, and worsening pain with sitting, standing, walking, bending, squatting, twisting and lifting. Dr. Prostin took claimant's oral history, reviewed an MRI taken on an unspecified date, and performed a physical examination, noting claimant had transient difficulties with her low back prior to the accident and did not feel impaired prior to the accident. He opined:

² P.H. Trans. (Dec. 14, 2015), Cl. Ex. 1 at 15.

³ See M.H. Trans. (May 26, 2016), Resp. Ex. C at 1.

On or about June 9, 2015, [claimant] sustained injury to her low back during the course of her employment. She has had injury to the L3-4 segment without neurologic compromise. She needs analgesic medicines and a gentle exercise program. At this time, she is capable of only light duty employment with avoidance of frequent bending or twisting at the waist or captive positioning. The injury sustained on or about June 9, 2015 while employed by [respondent] is the prevailing factor in causing the injury, the medical condition, and the need for medical treatment.⁴

Dr. Eden Wheeler examined claimant on August 19, 2015, as the result of a stipulated order appointing Dr. Wheeler as the authorized treating physician. Claimant complained of low back pain radiating up her spine to mid-back and down the back of her legs at times. Dr. Wheeler reviewed claimant's history, medical records, and performed a physical examination, finding claimant had "[l]umbar pain with intermittent proximal lower extremity symptoms, with MRI findings of left L3 facet and possibly pedicle bone marrow changes suggestive of contusion, with multilevel mild annular bulges from L3-S1 without stenosis or impingement."⁵ She determined:

[Claimant] presents today with primarily complaints of low back pain, which she attributes to her work activities, although without a specific event. She does acknowledge having prior limited chiropractic treatments for "pinched nerves", although denies lower extremity symptoms with these events. Unfortunately, those records are not available to confirm her specific complaints and treatment. Records do, however, reflect a prior thoracic ATV injury in 2002, with poor compliance with therapy. They also reveal prior left lower extremity subjective complaints, with ED assessment in June 2013; and lumbar complaints in August 2013, when maneuvering her daughter in her car seat. For the latter complaints, she was referred to therapy but was again noncompliant with treatment. Those therapy documents also reveal a pattern of radiation of lumbar symptoms into her proximal thighs, quite similar to reported complaints from today.

Therefore, given [claimant's] history of no specific work incident, as well as medical records reflecting similar complaints in 2014, I cannot identify her work activities as the prevailing factor for her current subjective complaints. Rather, I would find that her pre-existing condition is the source of her subjective symptoms, and would advise further evaluation/treatment through her primary care provider. With these opinions, no disability/impairment can be identified in relation to her alleged work event of 6/9/2015.⁶

⁴ P.H. Trans. (Dec. 14, 2015), Cl. Ex. 4 at 2-3.

⁵ P.H. Trans. (Dec. 14, 2015), Resp. Ex. A at 6.

⁶ *Id.*

Claimant began treating with Dr. Travis Foxx, a pain specialist, in December 2015. Claimant described deep, aching, shooting pain in her low back with radiating pain into her left lower extremity. She indicated her pain caused difficulty walking, driving, sleeping, working, and other activities of daily living, including caring for her young child. She told Dr. Foxx she was pain-free prior to the incident and was not taking medication. Dr. Foxx performed a physical examination and noted:

I have reviewed all records provided, completed a detailed history and physical exam. It is my opinion, with a reasonable level of medical certainty, [claimant's] current medical condition and related symptoms are a result of her work related injury, 6/9/15. [Claimant's] work related injury is the major contributing factor to her current medical condition. I recommend beginning treatment with transforaminal epidural steroid injections on the left at L3/4, L4/5 with fluoroscopic guidance.⁷

Dr. Foxx provided three injections and ordered physical therapy. In February 2016, Dr. Foxx noted:

[Claimant] describes resolution of her radiacular [sic] symptoms; however, she describes continued symptoms consistent with L2/3, L3/4 facet irritation. This is consistent with the description of Left L3 facet edema and possible stress fracture seen on her MRI. As a result, I will request authorization to complete Left lumbar diagnostic medial branch blocks at L2,3,4.⁸

Claimant underwent lumbar diagnostic medial branch blocks on March 3, 2016. She reported worsened pain following the procedure. Dr. Foxx recommended she be referred to Dr. Ciccarelli for a surgical evaluation on March 7, 2016. Claimant testified she has not been authorized to see a surgeon.

Court-ordered physician Dr. Terrence Pratt examined claimant on March 1, 2016, for an independent medical evaluation. Claimant complained of continuous dull, aching pain in her left low back with intermittent numbness and radiating symptoms to her lower extremities. Dr. Pratt reviewed claimant's medical records, history, and performed a physical examination. He determined claimant had "[l]ow back pain with questionable L3 finding with edema, L3-L4, L4-L5, and L5-S1 disk bulging and a small central protrusion."⁹

Dr. Pratt noted claimant's records indicated she reported complaints related to her work activities, but no specific event, in addition to preexisting lumbosacral involvement. He suggested claimant undergo a CT and/or bone scan to rule out a stress reaction related

⁷ M.H. Trans. (May 26, 2016), Cl. Ex. 1 at 30.

⁸ *Id.* at 8.

⁹ Pratt IME (Mar. 1, 2016) at 5.

to the question of edema at L3. Claimant had a CT scan on March 29, 2016. Dr. Pratt provided an addendum, dated April 6, 2016, to his previous IME. He wrote:

I have received March 29, 2016 documentation from CT lumbar region. Bilateral spondylolysis was seen at L3 and six lumbar vertebrae. There were no acute fractures.

The CT scan did not reveal any findings that were felt to be acute. Bilateral spondylolysis was noted but I could not relate that directly to her reported vocationally related activity. The additional information is beneficial. Significant evidence of involvement in relationship to vocationally related activities as the prevailing factor has not been identified.¹⁰

Dr. Pratt recommended restrictions of no frequent bending or twisting and no lifting over 15 pounds. Claimant testified she has not been offered accommodated employment by respondent since the date of the accident. Claimant stated she takes only over-the-counter medication and continues to have pain in her left low back, radiating into her leg.

PRINCIPLES OF LAW

K.S.A. 2014 Supp. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2014 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2014 Supp. 44-508(f) states:

(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor.

¹⁰ Pratt Addendum (Apr. 6, 2016).

An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

K.S.A. 2014 Supp. 44-508(g) states:

"Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹¹ Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2015 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.¹²

ANALYSIS

The ALJ quoted Dr. Pratt's comment that claimant has "a suspicious problem with her L3" and "[t]hat (L3 stress) could relate to acute activities."¹³ After writing these comments, Dr. Pratt ordered and reviewed a CT scan that showed bilateral spondylolysis at the L3 vertebrae. The CT scan showed no acute fractures. Dr. Pratt wrote an addendum report stating he could not, after reviewing the new CT scan, identify any significant involvement related to claimant's work activities.

The record contains evidence from four physicians relating to causation. Dr. Prostic opined claimant's injury with respondent was the prevailing factor for her need for medical treatment. Dr. Prostic notes only transient difficulties when referring to claimant's record of preexisting low back problems. There is no notation of the extent of prior medical records reviewed by Dr. Prostic.

Dr. Foxx believed claimant's work injury was the major contributing factor causing her current medical condition. Dr. Foxx noted Dr. Wheeler's opinion the condition was not work-related. He also makes note of claimant's incident lifting her daughter in 2013. Dr. Wheeler noted the 2014 visit to the emergency room caused by stepping out of the shower.

Dr. Wheeler did not find claimant's accident the prevailing factor for her complaints and opined claimant's preexisting condition was the source of her pain. Dr. Wheeler cited numerous prior medical records reviewed prior to rendering her opinion.

Dr. Pratt could not identify anything related to claimant's work that would be the prevailing factor for her medical condition. Dr. Pratt also performed an extensive review of claimant's medical history prior to arriving at his conclusions.

¹¹ K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, rev. denied 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

¹² K.S.A. 2015 Supp. 44-555c(j).

¹³ ALJ Order at 4.

The undersigned finds the opinions of Dr. Wheeler, an authorized treating physician, and Dr. Pratt, the court-appointed neutral examiner, more persuasive. Each had a better understanding of claimant's preexisting condition than either Dr. Prostic or Dr. Foxx. Dr. Pratt had the benefit of a current CT scan to resolve his concerns about a possible stress reaction.

CONCLUSION

It is more probable than not the prevailing factor causing claimant's current medical condition is a preexisting condition.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Steven M. Roth dated June 2, 2016, is reversed.

IT IS SO ORDERED.

Dated this _____ day of August, 2016.

HONORABLE SETH G. VALERIUS
BOARD MEMBER

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Hon. Steven M. Roth, Administrative Law Judge